Committee has reported that a formal investigation is necessary. As prescribed by The Advocates and Solicitors (Disciplinary Proceedings) Rules, 1963, the Statement of the Case, from which the paragraphs were deleted, was prepared by Mr. C.S. Wu representing the Council of the Law Society. It is therefore clear that under the scheme of the Act the Law Society has "sufficient interest" to apply for a *mandamus*.

Finally, it was urged on behalf of the appellant that this court in exercise of its discretion should refuse *mandamus*. We are not at all persuaded that we should do so. The Disciplinary Committee must not decline jurisdiction: it must do its several duties under the Act. The appellant must appear and answer the serious charges.

With regard to the name of the respondent in the proceedings here and in the High Court, we would order an amendment. The name of the applicant in the High Court and of the respondent before us should read as "The Law Society of Singapore."

For the reasons set out in this judgment, the appeal is dismissed with costs. We also make the usual consequential order for payment to the Law Society or its solicitors the deposit paid into court as security for its costs.

Appeal dismissed.

Solicitors: *T.Q. Lim & Co.; Donaldson & Burkinshaw.*

CHIANG HONG (PTE.) LTD. v. ONG BOON POK REALTY (PTE.) LTD.

[C.A. (Wee Chong Jin C. J., Kulasekaram & Chua JJ.) May 21, 1984]

[Singapore – Civil Appeal No. 4 of 1982]

Land Law – Sale and purchase agreement – New law restricting sale of property to citizens – Non-citizens and companies to obtain government approval – Effect on agreement – Whether contract could be rescinded.

Contract – Sale and purchase agreement – Side letter – Whether converted agreement into conditional contract.

Housing Developers – Sale and purchase agreement – New law restricting sale of property to citizens – Effect of.

Conveyancing – Sale and purchase agreement – New law restricting sale of property to citizens – Whether contract could be rescinded – Whether plaintiffs had taken all reasonable steps to obtain government approval for them to purchase property.

The facts of this case were briefly as follows. The plaintiffs, a development company, agreed to purchase from the defendants a piece of land at Tanah Merah Kitchil in August 1973. The plaintiffs paid a deposit of $260,000.00 being 10% of the purchase price of $2.6 million. The sale was subject to contract.

On September 10, 1973, the government issued a Statement of Future Restrictions of Ownership of Residential Properties. As from September 11, 1973 only Singapore citizens can purchase residential property without restriction. All permanent residents, non-citizens and companies incorporated in Singapore or abroad will require the written approval of the government to purchase residential property or any vacant land, *etc.* On September 24, 1973, the parties executed the Agreement. The purchase price was reduced to $2.4 million but the deposit remained the same. A "side letter" was written by the plaintiffs' solicitors. The letter stated, "the Agreement for Sale and Purchase is signed on the basis that the government will approve our clients' application to purchase the abovementioned property. In the event the government rejects our clients' application the deposit of $260,000 will be refunded to our clients forthwith. . . "

On September 27, 1973 the plaintiffs' solicitors wrote to the Registrar of Titles seeking approval for the purchase of the said property. The Registrar replied that the plaintiffs' application could not be considered as the Approval Committee had not yet been formed. The Registrar also inquired whether the plaintiffs were interested in altering the Memorandum and Articles of Association of the Company to restrict the entire membership and directorship of the company to only Singapore citizens and also to provide that such alteration shall remain immutable. At first the plaintiffs did consider amending their Memorandum and Articles of Association of the Company but subsequently the plaintiffs did not agree to the suggested amendment of their Memorandum and Articles of Association. On May 16, 1974 the Registrar replied that the case had been referred to the Ministry of National Development. The date for completion of the purchase as provided in Clause 3(3) of the Agreement had lapsed on May 15, 1974. Subsequent correspondence ensued between the parties culminating in the plaintiffs' demand for the refund of $260,000. The defendants counterclaimed against the plaintiffs for damages for breach of the aforesaid agreement. Sinnathuray J. gave judgment for the plaintiffs for $260,000 and dismissed the counterclaim ([1982] 1 M.L.J. 242). The defendants appealed.

The questions before the Court of Appeal were whether the side letter read with the agreement converted the agreement into a conditional contract, and whether the plaintiffs had taken all reasonable steps to obtain government approval for them to purchase the property.

Held: (1) the learned judge was correct in finding that the time fixed for completion of the contract of sale was made the essence of the contract. The condition in this case was a condition of the *Aberfoyle*[1] type;

(2) the plaintiffs had failed to take all reasonable steps before the completion date to obtain government approval for the purchase of the property.

(3) the appeal must be allowed. Order for enquiry as to damages on counter-claim.

Cases referred to:

(1) *Aberfoyle Plantations Ltd.* v. *Khaw Bian Cheng* [1960] A.C. 115; [1960] M.L.J. 47.
(2) *Property and Bloodstock* v. *Emerton* [1968] 1 Ch. 94, 116 & 118.
(3) *Benmax* v. *Austin Motor Co.* [1955] 1 All E.R. 326.

COURT OF APPEAL.

Arthur Leolin Price Q.C. (*Robert Tock* with him) for the appellants/defendants.

James Robert Reid Q.C. (*T.Q. Lim* with him) for the respondents/plaintiffs.

Cur. Adv. Vult.

Wee Chong Jin C.J. (delivering the Judgment of the Court): The appeal arose from a claim by Ong Boon Pok Realty Co. (Pte.) Ltd. ("the plaintiffs") for a refund of a sum of $260,000/- of the deposit paid by them to Chiang Hong (Pte.) Ltd. ("the defendants") under an Agreement of Sale of land dated September 24, 1973. The defendants counterclaimed against the plaintiffs for damages for breach of the aforesaid Agreement. The action was tried before Sinnathuray J. who gave judgment for the plaintiffs for $260,000/- with interest thereon and costs and dismissed the counterclaim with costs.

We allowed the defendant's appeal against the said judgment and dismissed the plaintiffs' claim and allowed the defendants' counterclaim and ordered an inquiry as to damages. We now give our reasons.

We reproduce below the material facts found by Sinnathuray J. in his judgment which reads as follows:

"The plaintiffs, Ong Boon Pok Realty (Pte.) Ltd., a family development company, were incorporated in Singapore in December 1957. All the shareholders and directors of the Company have been and are Singapore citizens. At all material times, the Company held a housing developer's licence under the Housing Developers (Control and Licensing) Act (Cap. 250).

The defendants, Chiang Hong (Pte.) Ltd., are the owners of the property. The land in the District of Tanah Merah Kitchil has an area of 108,561 sq. ft. or 10085.66 m2. On the land is a substantial two-storey bungalow house built in 1952, referred to as No. 306 Upper East Coast Road.

In August 1973 the plaintiffs' solicitors, Messrs Foo & Quek negotiated with the defendants's solicitors, Messrs Rodrigo and Tock, for the plaintiffs to purchase the property. The plaintiffs paid a deposit of $260,000/- being 10% of the purchase price of $2.6 million offered by the plaintiffs. The sale was subject to contract.

On September 10, 1973, the Government issued a Statement on Future Restrictions of Ownership of Residential Properties (the Government Statement). It was published in the *Straits Times* and other newspapers the next day. For the purpose of this case, it is sufficient to refer to the following matters in the Government Statement:

'Legislation will, therefore, be introduced and enacted, to take effect that as from tomorrow, September 11,1973, only citizens of Singapore can purchase residential property without any restriction. All others – permanent residents, non-citizens and companies incorporated in Singapore or abroad – will not be debarred from owning residential property. But they will require the written approval of the government to purchase residential property or any vacant land, other than that already zoned industrial-commercial. . .

Many residential properties are held in the name of limited companies, the shares of which are owned by citizens and non-citizens. Such limited companies holding both industrial-commercial properties, plus residential properties, will be given a grace period of a few years to sort out their properties between industrial-commercial which can be owned by anyone and residential which can be owned by citizens or approved persons only. One solution could be for the memorandum and articles of association of the limited company to be amended, so that only citizens can be shareholders or directors. Or, the holdings could be split into two companies, a first company whose shares can be held by anyone, and therefore cannot own residential land, and a second company whose shareholders and directors can be only citizens or approved persons and can own residential land ...

However, all persons and limited companies, comprising citizens or non-citizens shareholders or directors, formed to develop and construct residential houses for sale to citizens, will be encouraged to undertake such projects. They will be allowed to purchase residential land for such development and sale, or tender for Urban Renewal condominium projects.'

It is not necessary in these proceedings to consider in any detail the effect the Government Statement had on the heated property market at that time. It is sufficient to say that there was a break in the market, followed by a sharp fall in residential property values. By May 1974, the drop was about 50%. Residential property values continued to fall till about the end of 1976. They levelled off in 1977. It was therefore regarded by the parties that the Government Statement had materially affected them, particularly the plaintiffs as it impinged on their capacity to contract to purchase the property.

The parties executed the Agreement for Sale and Purchase (the Agreement) on September 24, 1973. The purchase price was reduced to $2.4 million but the deposit remained the same. On that day too, at about the time of the execution of the Agreement, the plaintiffs' solicitors obtained from the defendants' solicitors confirmation of the contents of the following letter (the side letter):

"We thank you for your letter of the 22nd instant and the enclosures therein.

In view of the recent announcement by the Government restricting the ownership of residential land by non-Singapore citizens and companies, the Agreement for Sale and Purchase is signed on the basis that the Government will approve our clients' application to purchase the abovementioned property. In the event the Government rejects our clients' application the deposit of $260,000.00 will be refunded to our clients forthwith. Please confirm.

Yours faithfully,

(Sgd. Foo & Quek)

We confirm.

(Sgd. Rodrigo & Tock)
24.9.73'

The dispute between the parties is as to the proper construction of the terms in the side letter.

It is convenient to set out here the material terms of the Agreement relevant to the consideration of the side letter. They are as follow:

'3. *Special Conditions*

(1) The Purchaser shall pay to the Vendor the sum of Dollars Two hundred and sixty thousand ($260,000/-) by way of deposit on the purchase price on the signing of this Agreement and the same shall be released to the Vendor on the 25th of September 1973.

(2) It has also been agreed between the parties hereto that the Purchaser shall make a further payment to the Vendor for the sum of Dollars Nine hundred and forty thousand ($940,000/-) on or before the 15th of January 1974.

(3) The purchase shall be completed on or before the 15th of May, 1974 and the balance of the purchase money amounting to Dollars One million two hundred thousand ($1 200,000/-) shall be paid at the office of M/S. RODRIGO & TOCK of No. 63-D, Telok Ayer Street, Room 3 (4th floor), on or before the 15th day of May, 1974.

... ...

(6) The land is sold subject to the following conditions:—

... ...

(3) Time for completion of the above is the essence of the contract herein.'

Reverting to the events, on September 27, 1973, the plaintiffs' solicitors, Messrs Foo & Quek wrote to the Registrar of Titles:

'Our client has entered into an Agreement on the 24th day of September 1973 to purchase the abovementioned property (residential property) subject to the Government approving our client's application to purchase the said property. It is our client's intention to develop the said property. We shall, therefore be much obliged if you will kindly confirm our client is an approved company permitted to own this piece of residential land.'

On October 15, 1973, the Registrar replied that the plaintiffs' application could not be considered as the Approval Committee for dealing with applications as that of the plaintiffs had not yet been formed. In her letter, the Registrar also inquired whether the plaintiffs were interested in altering the Memorandum and Articles of Association of the Company to restrict the entire membership and directorship of the Company to only Singapore citizens and also to provide that such alteration shall remain immutable.

At first the plaintiffs did consider amending their Memorandum and Articles of Association as suggested in the Registrar's letter. On December 15, 1973, the Registrar advised the plaintiffs' solicitors of the kind of special resolution that would be required to amend the Memorandum and Articles. The Registrar requested the solicitors to send to her the draft of the Special Resolution of the Company for her approval.

Then there was a change of mind on the part of the plaintiffs. On March 22, 1974, the plaintiffs' solicitors informed the Registrar that the board of directors of the plaintiffs was not prepared to amend the Memorandum and Articles of Association of the Company to restrict future membership to Singapore citizens only. The Registrar replied on May 16, 1974:

'In view of the fact that your clients are not agreeable to amend their Memorandum and Articles of Association to provide that all members and all directors shall be citizens of Singapore I have, therefore, referred this case to the Ministry of National Development. Could you please write to the Controller of Housing on this matter.'

The date for completion of the purchase under clause 3(3) of the Agreeement had lapsed the day before, on May 15, 1974.

As between the parties, however the defendants' solicitors made enquiries from the plaintiffs' solicitors, the latter kept the former informed of the stage at which the application was being considered by the Registrar of Titles. On January 9, 1974, the defendants' solicitors wrote to the plaintiffs' solicitors that they wanted payment of the sum of $940,000 under clause 3(2) of the Agreement which was due on January 15, 1974. As for the balance of $1.2 million due on the completion date they said that it could be retained by the plaintiffs pending the approval of the Government. This letter gave rise to a legal argument between the solicitors.

For the plaintiffs, Messrs Foo & Quek, in their letter dated January 30, 1974 contended that until such time as the plaintiffs' application is approved none of the clauses of the Agreement operates as otherwise the plaintiffs would be a party to an offence. Messrs Rodrigo & Tock for the defendants in their letter of February 4, 1974 stated their case thus:

'We do not dispute that the sale of the above to your clients is subject to the government's approval of your clients as purchasers. The terms of the Agreement for Sale will still be operative in so far as the second payment is concerned except for the balance payment of the 50% of the purchase

price which will be in abeyance pending the government's approval before completion can take place.

Should permission for the purchase of the above property be refused by the government, it will follow therefore that all payments made before completion (50% of the purchase price, that is, if the second payment is made by your clients) will be refundable to your clients.

In the circumstances, our clients have instructed us to demand payment of the sum of $940,000/- being the second payment forthwith from your clients . . . '

In another letter on February 14, 1974, Messrs. Rodrigo & Tock said:

'If payment is not made your client is in breach of the Agreement and it is our clients' option to bring proceedings for specific performance and damages or damages. Your client's deposit will in the latter event of course be forfeited.'

The plaintiffs never made payment of the sum of $940,000, and the defendants took no action.

On April 19, 1974, the defendants' solicitors inquired of the plaintiffs' solicitors whether the plaintiffs had obtained the necessary approval to purchase the property. They reminded the plaintiffs' solicitors that the date for completion was May 15, 1974. On May 14 the plaintiffs' solicitors replied that no approval has as yet been given. This led to another round of legal arguments between the solicitors.

On May 22, 1974, Messrs Foo & Quek wrote to the other side:

'. . . since approval has not been granted by the Government for our clients to purchase the abovementioned property and the date of completion (time being of the essence) has lapsed the Contract is null and void. Under the circumstances please advise your clients to refund us the 10% deposit immediately.'

Messrs Rodrigo & Tock replied on May 25, 1974. In their letter they took a completely different stand from the one they had taken earlier. They said:

'. . . our clients can neither agree with nor accept your clients' contention that since approval has not been granted by the Government for your clients to purchase the abovementioned (time being the essence) had lapsed, the Contract is null and void.

First, it should be understood that the Agreement for Sale and Purchase was signed 'on the basis that the Government will approve . . . ' and not 'subject to the Government approving . . . '.

Secondly, the Government authority has not yet disapproved your clients' application to purchase the above property. Thirdly, there is no indication that you have taken the necessary measures to render your clients eligible to purchase the above property such as amending the Memorandum & Articles of Association of the Company."

It was not in dispute that had the Agreement stood alone, without the side letter, it would have created an immediate binding and unconditional contract for the sale of the property by the defendants to the plaintiffs at the price of $2.4 million and, subject to title being properly deduced, the plaintiffs would have to pay, under Clause 3(2) the further payment of $960,000/- on or before January 15, 1974, and, on the completion date, the balance of the purchase price amounting to $1.2 million.

The case of the plaintiffs was that by the Agreement and the side letter, which was intended by the parties to qualify the Agreement, the contract was a conditional contract in that it was entered into "on the basis (*i.e.* foundation or substratum) that Government will approve" the plaintiffs' application to purchase the property. They said that it matters not whether the condition was a condition precedent or a condition subsequent because the condition must be satisfied by the completion date which, they said, was May 15, 1974 as time was made of the essence of the contract by paragraph (3) of Clause 3(6) of the Agreement. They said they had done all that was required of them to satisfy the condition, *i.e.* to obtain the Government's approval to purchase the property, before the completion date and no Government approval was forthcoming before the contractual completion date or at any reasonable date thereafter. It was also the plaintiffs' case that if the condition in the side letter was not a condition precedent to the formation of the contract, then the contract was void for illegality.

The case for the defendants was that the side letter added a new contractual term to the Agreement which new term was introduced by the following words in the side letter:

". . . the Agreement for Sale and Purchase is signed on the basis that the Government will approve our clients' application to purchase the above-mentioned property."

The argument was that these words are not expressed as a condition and the words "on the basis that" are not equivalent to "subject to the condition that." The new contractual term expressed in the sentence "In the event the Government rejects our clients' application the deposit of $260,000/- will be refunded to our clients forthwith" did not make the Agreement a conditional agreement for sale and purchase but at most an agreement containing a term that in the particular event specified, *i.e.* Government's rejection of the plaintiffs' application to purchase the property, the contract is dissolved and the deposit must be repaid. It was conceded that if the particular event specified occurs the contract is dissolved as regards

further performance by either party but without prejudice to any claims or remedies arising out of non-performance of contractual obligations prior to that dissolving event.

The defendants also contended that even if the side letter created a condition precedent the condition had to be fulfilled by the plaintiffs within a reasonable time. They submitted that what constitutes a reasonable time depends upon the intention of the parties as expressed in, or to be implied from, the language they used and that the time fixed for completion in the Agreement had not been made of the essence of the contract by Clause 3(6)(3). They submitted that it would be much more likely that the parties intended that a reasonable time would be equivalent to the time the Government machinery took to process the plaintiffs' application for approval to purchase the property.

It was never in dispute that the plaintiffs were under an obligation to take all reasonable steps *to obtain the Government's approval.*

Did the Side Letter read with the Agreement convert the Agreement into a Conditional Contract?

The learned trial judge found that the parties intended the side letter to qualify the Agreement and that on the true construction of the side letter, in particular the phrase "on the basis that," it had converted the Agreement from an unconditional contract to a conditional contract, the condition being that there is no contract under the Agreement until the Government gives its approval for the plaintiffs to purchase the property. He held further, that the time fixed for completion in the Agreement was made the essence of the contract by Clause 3(6)(3) and that as the condition was not fulfilled by the completion date, May 15, 1974, the plaintiffs having done all that was required of them to fulfil the condition, there never was a binding contract between the parties. In arriving at that conclusion he held that the principles laid down in *Aberfoyle Plantations Ltd.* v. *Khaw Bian Cheng*[1] applied to the present case.

The defendants submitted before us that the *Aberfoyle* case is distinguishable because in the *Aberfoyle* case:

1. The conditional character of the purchase was clear.

2 There was a provision that on non-fulfilment of the condition the agreement was to become "null and void."

3. The condition did not have to be fulfilled by the party who claimed that the agreement was void in consequence of its non-fulfilment.

4. It was clear that the condition had not been fulfilled by the date of completion.

5. The observation of Danckwerts L.J. in *Property and Bloodstock* v. *Emerton.*[2]

The principles referred to are contained in the judgment of Lord Jenkins who delivered the judgment of the Privy Council (page 124):

"But, subject to this overriding consideration," (by which, I infer, he meant the intention of the parties as expressed in, or to be implied from, the language they have used) "their Lordships would adopt, as warranted by authority and manifestly reasonable in themselves, the following general principles: (i) Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date; (ii) where a conditional contract of sale fixes no date for completion of the sale then the condition must be fulfilled within a reasonable time; (iii) where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles."

Later on, (at page 126), Lord Jenkins said:

"Before parting with these two authorities (*Smith* v. *Butler* [1900] 1 Q.B. 694 and *In re Sandwell Park Colliery Co.* [1929] 1 Ch. 277) their Lordships would observe that the reason for taking the date fixed for completion by a conditional contract of sale as the date by which the condition is to be fulfilled appears to their Lordships to be that until the condition is fulfilled there is no contract of sale to be completed, and accordingly, that by fixing a date for completion the parties must by implication be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at latest."

The defendants also submitted that the condition in the present case is not a condition of the *Aberfoyle* type, *i.e.*, a condition precedent, which unless it is fulfilled or waived by the party entitled to waive it, the contract in which it is embodied does not normally take effect as a contract of sale in the sense of establishing the relationship of vendor and purchaser. It was submitted that the condition is simply one of the terms of a contract of sale and did not prevent the contract of sale being unconditional but subject to a term in the contract which, if not performed, does of itself discharge the contract without breach.

At the conclusion of the appeal we were satisfied that the learned judge was correct in finding that the time fixed for completion of the contract of sale under Clause 3(3) of the Agreement was made the essence of the contract by Clause 3(6)(3) and we were in agreement with him that it would make nonsense of Clause 3(6)(3) to construe it as only making time of the essence of Clause 3(6)(1) and Clause 3(6)(2).

We were also satisfied that the learned judge was correct in applying the principles laid down in the *Aberfoyle* case to the present case. In our judgment the condition in the present case is a condition of the *Aberfoyle* type and "was a condition precedent on the fulfilment of which the formation of a binding contract of sale between the parties was made to depend."

Did the plaintiffs take all reasonable steps to obtain Government approval before the completion date, May 15, 1974, time being of the essence.

The Government "Statement on Future Restrictions of Ownership of Residential Properties" was made public on September 11, 1973 after the parties had entered into negotiations for the sale and purchase of the property, a substantial residential two-storey bungalow built in 1952 and standing on 108,561 sq. ft. or 10085.66 m2 of land. In August 1973, the price having been agreed at $2.6 million the plaintiffs paid through their solicitors to the defendants' solicitors $260,000/- being 10% of the purchase price, subject to contract.

On September 24, 1973, almost two weeks after publication of the Government Statement and one month after payment of the 10% deposit, the sale and purchase Agreement was executed wherein the purchase price was reduced to $2.4 million and the completion date, time being of the essence, was fixed for May 15, 1974. On the evidence before him, the learned judge found that the Government Statement had the effect on the heated property market at that time of "a break in the market followed by a sharp fall in residential property value. By May 1974 the drop was about 50%."

In our opinion, it is clear from the passages of the Government Statement that have earlier been reproduced that legislation will be enacted retrospective to September 11, 1973 that only Singapore citizens could "purchase residential property without any restriction." Limited companies, whether incorporated in Singapore or elsewhere would require the written approval of the government to purchase "residential property or vacant land other than that already zoned industrial-commercial."

It is also clear from those passages that non-Singapore citizens and all limited companies "formed to develop and construct residential houses for sale to citizens . . . will be allowed to purchase residential land for development and sale . . . "

In the paragraph of the Government Statement dealing with the question of residential properties held in the name of limited companies, the shares of which are owned by citizens and non-citizens, the statement contains a sentence which reads: "one solution could be for the memorandum and articles of association of the company to be amended, so that only citizens can be shareholders and directors."

It is implicit from this sentence that a company incorporated in Singapore whose shareholders and directors can be only Singapore citizens will be granted approval to own or purchase residential properties. The plaintiffs, as can be seen from the letter from their solicitors to the Registrar of Titles dated September 27, 1973, were aware of this implication. In that letter, which sought approval for them to purchase the subject property, it is stated that the plaintiffs were a housing developer of long standing holding a housing developer's licence and that all their shareholders and directors are Singapore citizens and that the company's "intention was to develop the said property." On October 15, 1973 the Registrar of Titles wrote a letter to the plaintiffs' solicitors which, as far as it is material, reads as follows:—

"It is regretted that your clients' application cannot be considered at this stage as the Approval Committee dealing with applications for approval of such nature has not yet been formed. However, I forward herewith a Form of Particulars (Form B) for your clients' completion and return. When I receive the Form duly completed, the application could then be processed.

I would further draw your attention to paragraph 8 of the Government Statement dealing with companies. If your clients are interested in altering the Memorandum and the Articles of Association to restrict the entire membership of the company to only Singapore citizens and also to provide that such alteration shall remain immutable, and further that all directors shall be Singapore citizens, could you please state so in your letter when you return the Form."

Form B, as far as it is material, requires

particulars of the name, country of incorporation, registered address of the company, a copy of its Memorandum and Articles of Association, a list of its members, including shareholders and directors with their names, address, occupations and citizenship. Form B also requires the company to state whether any Article provides that all members including shareholders and directors shall be Singapore citizens or approved persons (who are defined as persons to whom Government has given written approval to purchase immovable properties in accordance with the Government Statement).

On December 4, 1973 the plaintiffs' solicitors wrote to the Registrar of Titles a letter which reads as follows:

"Dear Sir,

re: No. 306 Upper East Coast Road

We refer to paragraphs 3 and 4 of your letter of October 15, 1973.

We return herewith Form B together with a list of the members of the company and a copy of the Memorandum and Articles of Association.

Our clients confirm they are prepared to amend the Memorandum and Article of Association to restrict the entire membership of the company to Singapore citizens only. All directorships will be restricted to Singapore citizens.

Yours faithfully,

Sgd. Foo & Quek"

On December 15, 1973 the Registrar of Titles replied to the plaintiffs' solicitors by letter which reads as follows:

"Dear Sir,

Re : RESTRICTION OF OWNERSHIP OF PROPERTIES (OTHER THAN THOSE ALREADY ZONED COMMERCIAL-INDUSTRIAL) – NO. 306 UPPER EAST COAST ROAD.

Please refer to your letter of the 4th instant returning my Form B together with a list of members of the company attached and a copy of your clients' Memorandum and Articles of Association.

2 I would refer you to the Special Resolution effecting the alterations to the Memorandum and Articles of Association of the Holland Grove Development (Pte) Ltd which are now filed with the Registrar of Companies. I have already given clearance to this Company. Could you please forward me the draft Special Resolutions for my approval before they are passed.

3 Clearance will be given to the company after I am satisfied that you have complied with the above alterations required by me and also other procedural requirements which I will convey to you at a later date after I have received the Special Resolutions.

Yours faithfully,

Sgd. Mrs N.C. Yoong
Registrar of Titles."

We pause to observe that the plaintiffs' solicitors did not keep the defendants' solicitors informed of the correspondence passing between themselves and the Registrar of Titles, except the first letter dated September 27, 1973, although they were corresponding with the defendants' solicitors on other aspects of the contract. It is significant that they wrote on December 5, 1973 to the defendants' solicitors stating that the plaintiffs' application could not then be considered as the Approval Committee dealing with applications had not yet been formed but failed to inform the defendants' solicitors of the fact that they had on the previous day, December 4, 1973, written to the Registrar of Titles that their clients were "prepared to amend their Memorandum and Articles of Association to restrict the entire membership of the company to Singapore citizens only" and that "all directors will be restricted to Singapore citizens."

It is also significant that five months before the date fixed for completion the defendants were aware, from the Registrar of Title's letter of December 15, 1973, that clearance had been given to a company which had altered its Memorandum and Articles of Association and that clearance will be given to the plaintiffs after the Registrar of Titles was satisfied that the plaintiffs "have complied with the above alterations required by me and also other procedural requirements which I will convey to you at a later date after I have received the Special Resolutions."

The next relevant letter is a letter from the Registrar of Titles dated March 13, 1974 which was received by the plaintiffs' solicitors on March 15, 1974. It reads:

"Dear Sirs,

RESTRICTION OF OWNERSHIP OF PROPERTIES (OTHER THAN THOSE ALREADY ZONED COMMERCIAL-INDUSTRIAL) – NO. 306 UPPER EAST COAST ROAD

Further to my letter of December 15, 1973 could you kindly let me know if planning approval has been granted for the proposed development of the above property. If so,

please furnish the reference particulars of the Chief Planner for my file and record.

Yours faithfully,

Sgd. Mrs N.C. Yoong
REGISTRAR OF TITLES"

On March 16, 1974 the plaintiffs' solicitors received a letter dated March 15, 1974 from the plaintiffs which reads:

"Dear Sirs,

re: No. 306 Upper East Coast Road

We refer to the above matter and like to inform you that our Board of Directors will not prepare to amend the Memorandum and Articles of Association of the Company to restrict the entire membership of the Company to Singapore Citizens.

Kindly inform the Registrar of Titles that the planning approval has not been granted by the relevant authorities.

Yours faithfully,

Sgd."

On March 22, 1974 in accordance with the contents of the plaintiffs' letter of March 15, 1974 the plaintiffs' solicitors wrote to the Registrar of Titles a letter which reads:

"Dear Sir,

re: 306, Upper East Coast Road

We thank you for your letter of the 13th instant.

We have been instructed by our clients planning approval has not been granted for the proposed development of the abovementioned property.

Reference is made to our letter of December 4, 1973. We have now been instructed by our clients the Board of Directors are not prepared to amend the Memorandum and Articles of Association of the company to restrict future membership to Singapore Citizens only. In our letter of December 4, 1973 we said our clients were prepared to amend the Memorandum and Articles of Association. In view of the Board's decision the instructions given by the Officer of the company is, therefore, countermanded. We regret any inconvenience caused.

Please let us know whether our clients' application can be approved soon.

Yours faithfully,

Sgd. Foo & Quek"

Further correspondence ensued between the parties' solicitors in April and May 1974 of which two letters are relevant on this issue. The first letter was from the plaintiffs' solicitors and so far as it is material, reads:

". . . since approval has not been granted by the Government for our clients to purchase the abovementioned property and the date of completion (time being of the essence) has lapsed the Contract is null and void. Under the circumstances please advise your client to refund us the 10% deposit immediately."

The defendants' solicitors replied on May 25, 1974 as follows:

"Thirdly, there is no indication that you have taken the necessary measures to render your clients eligible to purchase the above property such as amending the Memorandum and Article of Association of the Company."

The learned judge took the view that all that the plaintiffs had to do when making an application for approval to purchase was "to state that they intended to develop and construct residentia houses for sale to citizens which is in effect what they said in their letter to the Registrar of Titles on September 27, 1973." He also found that it was entirely reasonable of them to "refrain from taking the drastic and immutable step of changing the constitution of the company because the Government Statement did encourage 'all persons and limited companies, comprising citizen or non-citizen shareholders or directors, formed to develop and construct residential houses for sale to citizens . . . to undertake such projects. They will be allowed to purchase residential land for such development and sale, or tender for Urban Renewal Condominium projects.' "

At the conclusion of the appeal we formed a different opinion from that of the learned judge and were of the opinion that the plaintiffs had failed to take all reasonable steps before the completion date to obtain Government approval for the purchase of the property. In *Benmax* v. *Austin*[3] the headnote reads:

"An appellate court, on an appeal from a case tried before a judge alone, should not lightly differ from a finding of the trial judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form its own independent opinion, though it will give weight to the opinion of the trial judge."

The question was whether the plaintiffs had taken all reasonable steps to obtain Government approval for them to purchase the property. The primary facts which were never in dispute are as

follows: The plaintiffs are a private limited company incorporated in Singapore in 1957. It was a family development company. Its shareholders and directors are Singapore citizens. It is a housing developer with a housing developers' licence. The "contract" was entered into with full knowledge of the contents of the Government Statement. Completion date was set for May 15, 1974. On September 27, 1973 it sought from the Registrar of Titles such Government approval stating it was their intention to develop the property. On October 15, 1973 the Registrar of Titles sent a Form B for the company to complete and inquired whether the company was interested in altering its Memorandum and Articles of Association to restrict membership and directors to only Singapore citizens and that such alteration should remain immutable. On November 4, 1973 the company returned the Form B duly completed and confirmed that it was prepared to amend the Memorandum and Articles of Association to restrict membership and directorship to Singapore citizens only. The plaintiffs were told on December 15, 1973 by the Registrar of Titles that approval was forthcoming if satisfied that plaintiffs had altered its Memorandum and Articles of Association and complied with other procedural requirements. Four months' later on March 15, 1974, the company changed its mind regarding amending its Memorandum and Articles of Association. At the trial its managing director who was appointed to that office in December 1977, years after the material dates, gave evidence that there were some foreigners interested in joining the company "and that foreigners joining our company will help our company financially." He denied, when cross-examined, any knowledge that the Registrar of Titles had suggested that the company amend its Memorandum and Articles of Association. In our opinion his evidence was entirely irrelevant on this question and therefore the company gave no reasons why it had changed its mind.

We were satisfied on the facts of this case that the plaintiffs would have had no difficulty whatsoever in amending its Memorandum, if necessary, and its Articles of Association to restrict its membership and its directorship to Singapore citizens only. No evidence was led that they took any steps at all to amend its Memorandum, if necessary, and its Articles of Association, which was a step which could be reasonably expected of them. No explanation or reasons were given why they changed their minds about altering the Memorandum and Articles of Association in such a way that approval would be granted subject to compliance with other procedural requirements. In our opinion the plaintiffs failed to do everything which could be reasonably expected of them and for these reasons we allowed the appeal and dismissed the plaintiffs' claim and as it was agreed that the only possible course on the defendants' counter-claim is to order an inquiry as to damages, we ordered that there be an inquiry as to damages on the counter-claim.

Order accordingly.

Solicitors: *P.C. Tock & Co; Foo & Quek.*

ONG HER HOCK v. PUBLIC PROSECUTOR

[C.C.A. (Wee Chong Jin C.J., Thean & Coomaraswamy JJ.) May 29, 1986]

[Singapore – Criminal Appeal No. 4 of 1985]

Evidence – Dying declaration – Whether properly admitted as evidence.

Criminal Law and Procedure – Murder – Dying declaration – Whether properly admitted as evidence.

The appellant appealed against his conviction by the High Court on a charge of murder of one Phua Ah Kau. Before he died, the deceased had spoken to his brother, Phua Chan Hooi, that he had been stabbed by "Tiong Gi Tong Eh Lang" meaning "the people from Tiong Gi Tong Triad Society." Subsequently when the police arrived, the deceased told one Corporal Subramani that two Chinese unknown to him were responsible for his injuries. Whilst in the ambulance, he told the ambulance officer that two male Chinese who were unknown to him had stabbed him. In this appeal, the appellant contended, *inter alia,* that these "dying declarations" made by the deceased were wrongly admitted as evidence. It was argued that to be admissible the exact words uttered by the deceased must be adduced in evidence by the person to whom those words were spoken.

Held, dismissing the appeal: (1) the recollection of the last words spoken by a dying man by a witness who is at the scene or arrives shortly thereafter and hears a dying declaration may properly be received in evidence. In the present case the witnesses gave evidence of their recollection of the last words spoken by the deceased and their evidence was properly admitted;

(2) the trial judges were justified on all the evidence before them in finding the appellant guilty of the offence of murder.

Case referred to:

(1) *Toh Lai Heng* v. *Regina* [1961] M.L.J. 53.